

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

EUROIMMUN A.G., A PERKINELMER COMPANY)	Civil Action No. 18-cv-4311
)	
Plaintiff,)	
)	
v.)	
)	
CD BIOSCIENCES INC d/b/a/ CREATIVE DIAGNOSTICS)	COMPLAINT AND DEMAND FOR JURY TRIAL
)	
Defendant.)	
)	

NATURE OF THE ACTION

1. Plaintiff EuroImmun A.G. (“EuroImmun”), by and through its attorneys, Day Pitney LLP, brings this action against Defendant CD Biosciences Inc. d/b/a Creative Diagnostics (“Creative Diagnostics”) for false designation of origin in violation of the Lanham Act, the New York Deceptive Acts Laws, and the common law of the State of New York and copyright infringement.

2. EuroImmun seeks damages and injunctive relief arising from Creative Diagnostics’ unpermitted sale and offer for sale of EuroImmun’s product after removing EuroImmun’s labels and replacing them with its own labels.

THE PARTIES

3. EuroImmun is a corporation incorporated under the laws of Germany.

4. Upon information and belief, Creative Diagnostics is a New York corporation with its principal place of business located at 45 Ramsey Road, Shirley, New York 11967.

5. Upon information and belief, Wayne Zhang, also known as Wenyi Zheng, Will

Zhang, and Jing Zhang (hereinafter “Mr. Zhang”) is a shareholder and officer or director of Creative Diagnostics.

6. Upon information and belief, at least eighteen (18) other entities operate businesses at 45 Ramsey Road, Shirley, New York 11967, and Mr. Zhang is a shareholder and officer of eleven (11) of those entities that do business as Creative Biolabs, Creative Biomart, Creative Biogene, Creative Proteomics, Creative Biostructure, Creative Bioarray, Creative Animodel Inc., CD Genomics, Profacgen, Protheragen Inc., and BOC Sci.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338, and 1367.

8. This Court has personal jurisdiction over Creative Diagnostics because it transacts business in New York and has committed tortious acts in New York.

9. Venue is proper in the Eastern District of New York under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claims asserted herein occurred within this District.

FACTS

EuroImmun’s Products

10. EuroImmun, and its parent company, PerkinElmer, Inc., are well-established innovators and leaders in the medical research community. Since its founding in 1987, EuroImmun has researched, designed, manufactured, sold, and supported systems and devices

for the medical research community. These systems and devices include, but are not limited to, instruments, reagents, and kits for diagnosis of diseases.

11. EuroImmun has received public recognition for its kits related to detection of infectious disease, allergy, and autoimmune conditions, as well as other diagnostic and medical products, due to their accuracy and reliability.

12. EuroImmun is trusted by the world's prominent medical research communities and institutions and distributes its systems and devices throughout the United States through its subsidiary EuroImmun U.S., Inc.

13. Since at least 2004, EuroImmun has been selling its products marked with its name (EUROIMMUN) and the image shown below as its trademarks. EuroImmun uses its trademarks as its corporate logo and as a trademark for its products and services offered worldwide and in all fifty (50) states in the United States. In addition to its common law rights in such trademarks, EuroImmun owns valid and subsisting U.S. trademark registrations for marks comprised of or containing its name and/or logo. (*See* EUROIMMUN, Reg. Nos. 3,264,077 and 3,662,950, attached as Exhibit A.)



14. EuroImmun manufactures and offers for sale an Anti-Measles (IgG) Avidity Determination Kit for detection of the measles virus. The measles virus, also known as rubeola, is highly contagious and potentially lethal among children; therefore, accuracy and reliability of diagnosis is of the utmost importance. *See Measles (Rubeola)*, Center for Disease Control and Prevention (June 9, 2017), <https://www.cdc.gov/measles/index.html>.

15. EuroImmun's Anti-Measles (IgG) Avidity Determination Kit contains one (1) test plate in white plastic packaging, one (1) test instruction booklet containing detailed instructions and warnings regarding use of the kit, one (1) quality control certificate, and fifteen (15) bottled liquids, each with a color combination unique to EuroImmun and a label that bears EuroImmun's trademarks. The Kit is packaged in a white box bearing EuroImmun's prominent trademarks. (See Figures 1a, 1b, 1c, 1d.)



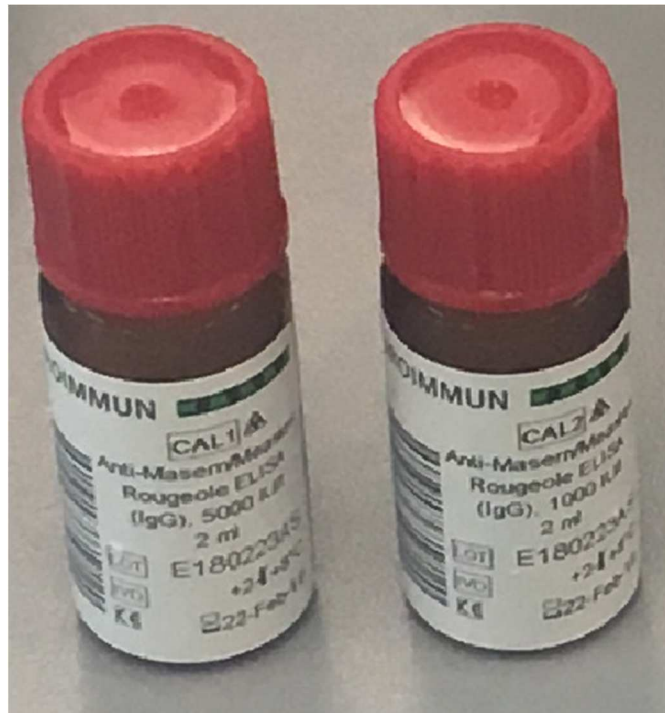
(Figure 1a: Exterior of EuroImmun Anti-Measles (IgG) Avidity Determination Kit)



(Figure 1b: Interior of EuroImmun Anti-Measles (IgG) Avidity Determination Kit)



(Figure 1c: Contents of EuroImmun Anti-Measles (IgG) Avidity Determination Kit)



(Figure 1d: Close up of bottles in EuroImmun Anti-Measles (IgG) Avidity Determination Kit)

Creative Diagnostics' Tortious Conduct

16. Upon information and belief, Creative Diagnostics holds itself out as “a leading manufacturer and supplier of antibodies, viral antigens, diagnostic components, and critical assay reagents.” *Antibodies, Antigens, Elisa Kits for Life Science*, Creative Diagnostics, <https://www.creative-diagnostics.com/> (last visited July 30, 2018).

17. In or about February 2018, EuroImmun became aware that Creative Diagnostics was distributing a marketing publication describing certain measles avidity determination kit (Order No. DEIABL91) that presented data and other descriptive and background information that were identical to those published by EuroImmun. The marketing publication represents that the measles avidity determination kit (Order No. DEIABL91) is manufactured by Creative Diagnostics.

18. In or about May 2018, EuroImmun purchased one of the measles avidity determination kits (Order No. DEIABL91) described in Creative Diagnostics' marketing publication and, upon information and belief, determined that Creative Diagnostics was re-labelling and selling EuroImmun's Anti-Measles (IgG) Avidity Determination Kit without permission. Specifically, Creative Diagnostics' measles avidity determination kit:

- a. contained the same solutions in the same distinct colored bottles as EuroImmun's Anti-Measles (IgG) Avidity Determination Kit (*see* Figure 2b below), however, the bottle labels with EuroImmun's trademarks had been replaced with Creative Diagnostic labels, as evidenced by glue residue (*see* Figure 2c below); and
- b. was packaged in a blue box featuring Creative Diagnostics' marks, instead of EuroImmun's white box featuring EuroImmun's trademarks (*see* Figure 2a).



(Figure 2a: Exterior of Creative Diagnostics measles avidity determination kit)



(Figure 2b: Contents of Creative Diagnostics measles avidity determination kit)



(Figure 2c: Close up of bottles in in Creative Diagnostics measles detection kit showing labels)



(Figure 2d: Close up of bottle in Creative Diagnostics measles detection kit with glue residue)

19. Upon information and belief, Creative Diagnostics intentionally replaced EuroImmun's visible labels on its Anti-Measles (IgG) Avidity Determination Kit with Creative Diagnostics' own labels to misrepresent to the public that it is capable of manufacturing and supplying measles detection kits with the same accuracy and reliability as EuroImmun's Anti-Measles (IgG) Avidity Determination Kit.

20. Creative Diagnostic's reverse-passing off has irreparably injured and, if permitted to continue, will further damage EuroImmun and good will associated with EuroImmun's trademarks.

21. Creative Diagnostics' reverse-passing off is likely to cause confusion as to the source or origin of its re-labeled kits and damage the public's interest in being free from confusion as to their source, sponsorship, or approval.

COUNT I

(False Designation of Origin and Unfair Competition under 15 U.S.C. § 1125(a))

22. Paragraphs 1–21 are hereby incorporated by reference as if fully set forth herein.

23. Creative Diagnostics obtained EuroImmun’s Anti-Measles (IgG) Avidity Determination Kit (Order No. EI 2610-9601-1 G) and replaced EuroImmun labels with its own before offering for sale.

24. Creative Diagnostics’ reverse-passing off, as described above, is likely to cause confusion, mistake, or deception as to the origin, sponsorship, or approval of Creative Diagnostics’ re-labeled measles avidity determination kits, and thus constitutes false designation of origin and unfair competition in violation of 15 U.S.C. § 1125(a).

25. Upon information and belief, Creative Diagnostics’ conduct described above is willful.

26. As a direct and proximate result Creative Diagnostics’ conduct described above, EuroImmun was harmed and would continue to be harmed.

COUNT II

(Deceptive Acts and Practices under N.Y. GBL § 349(a))

27. Paragraphs 1–26 are hereby incorporated by reference as if fully set forth herein.

28. Creative Diagnostics committed an unfair or deceptive act or practice, notably by false designation of the origin of its measles virus avidity determination kit and reverse-passing off thereof.

29. Creative Diagnostics’ conduct described above was performed in the course of conducting business, trade, and commerce.

30. Creative Diagnostics' conduct described above targeted consumers to believe the false designation of the origin of its kits.

31. Creative Diagnostics' conduct described above is intentionally deceptive in a material way that is likely to mislead a reasonable consumer.

32. As a direct and proximate result of Creative Diagnostics' conduct described above, EuroImmun was harmed and would continue to be harmed.

COUNT III

(Common Law Unfair Competition and Misappropriation)

33. Paragraphs 1–32 are hereby incorporated by reference as if fully set forth herein.

34. Creative Diagnostics' conduct described above, notably false designation of the origin of its measles virus avidity determination kit and reverse-passing off thereof, has caused confusion in the mind of the public, or is likely to cause such confusion or mistake.

35. Therefore, Creative Diagnostics has acted unfairly as alleged above.

COUNT IV

(False Advertisement under N.Y. GBL § 350)

36. Paragraphs 1–35 are hereby incorporated by reference as if fully set forth herein.

37. Creative Diagnostics' label, packaging, and advertisement targeted consumers to believe the false designation regarding the origin of the measles virus avidity determination kit.

38. At least EuroImmun has relied on Creative Diagnostics' misleading label and advertisement to purchase Creative Diagnostics' measles avidity determination kit.

39. Creative Diagnostics' conduct described above is intentionally deceptive in a material way that is likely to mislead a reasonable consumer.

40. As a direct and proximate result of Creative Diagnostics' conduct alleged above, EuroImmun was harmed and would continue to be harmed.

COUNT V

(Common Law Misrepresentation and Fraud)

41. Paragraphs 1–40 are hereby incorporated by reference as if fully set forth herein.

42. Creative Diagnostics offers for sale measles avidity determination kits with labels showing it as the manufacturer.

43. Upon information and belief, Creative Diagnostics does not manufacture the measles avidity determination kits that it offers for sale and instead re-labels and sells EuroImmun's Anti-Measles ELISA (IgG) Avidity Determination Kit without permission.

44. Upon information and belief, Creative Diagnostics' conduct described above is willful.

45. At least EuroImmun has relied on Creative Diagnostics' misleading label and advertisement to purchase Creative Diagnostics' kit.

46. As a direct and proximate result of Creative Diagnostics' conduct alleged above, EuroImmun was harmed and continues to be harmed.

COUNT VI

(Copyright Infringement under 17 U.S.C. § 501)

47. Paragraphs 1–46 are hereby incorporated by reference as if fully set forth herein.

48. EuroImmun has created a test instruction booklet for Anti-Measles (IgG) Avidity Determination Kit, attached as Exhibit B, and owns a valid, registered copyright therein.

49. Creative Diagnostics has copied EuroImmun's copyrighted test instruction booklet and distributed it as a marketing publication in a virtually identical form, attached as Exhibit C.

PRAYER FOR RELIEF

WHEREFORE, EuroImmun requests the following relief:

A. An order declaring that Creative Diagnostics' reverse-passing off constitutes unfair competition and unfair trade practices under federal and/or state law, as detailed above;

B. An injunction preliminarily and permanently enjoining Creative Diagnostics and its employees, officers, directors, principals, parents, subsidiaries, affiliates, related companies, and all persons in active concert or participation with any of them:

i. From selling, supplying or distributing EuroImmun's products, including EuroImmun's Anti-Measles IgG) Avidity Determination Kit, as its own, including fulfillment of any existing orders;

ii. From selling, supplying or distributing EuroImmun's test instruction booklets, including EuroImmun's Anti-Measles (IgG) Avidity Determination Kit test instruction booklet, in whole or in part, as its own;

iii. From representing by any means whatsoever, directly or indirectly, that Creative Diagnostic manufactures, sells, or offers for sale measles virus (IgG) avidity determination kits; and

iv. Instructing, assisting, aiding, or abetting any other person or business entity in engaging or in performing any of the activities referred to in subparagraphs B.i through B.iii above.

C. An order directing Creative Diagnostics to immediately return all EuroImmun Anti-Measles (IgG) Avidity Determination Kits in its possession or that have been re-labelled and bear Creative Diagnostics' logo and/or trademark and to remove all references to Anti-Measles (IgG) Avidity Determination Kits, including but not limited to Creative Diagnostics' website, third-party websites, advertisement and other promotional materials, videos, posters, displays, brochures, catalogs, newsletters, e-mails, manuals, forms, and any other materials and things that bear or display Anti-Measles ELISA (IgG) Avidity Determination Kits or products manufactured by EuroImmun;

D. An order directing Creative Diagnostics to file with this Court and serve on EuroImmun's attorneys, thirty (30) days after the date of entry of any injunction, a report in writing and under oath setting forth in detail the manner and form in which it has complied with the injunction;

E. An order requiring Creative Diagnostics to account for all EuroImmun Anti-Measles (IgG) Avidity Determination Kits, or that have been re-labelled and bear Creative Diagnostics' logo and/or trademark, currently in its possession and all sales (including past and pending sales);

F. An order requiring Creative Diagnostics to account for and pay to EuroImmun any and all profits arising from the foregoing acts of false designation of origin and unfair competition, and increasing such profits for payment to EuroImmun in accordance with 15 U.S.C. § 1117 and other applicable laws;

G. An order requiring Creative Diagnostics to pay EuroImmun compensatory and statutory damages caused by the foregoing acts of deceptive acts and unfair trade practices;

H. An order requiring Creative Diagnostics to pay EuroImmun punitive damages for

its willful misconduct;

I. An order requiring Creative Diagnostics to pay EuroImmun's costs and attorneys' fees in this action pursuant to 15 U.S.C. § 1117 and other applicable laws; and

J. Other relief as the Court may deem appropriate.

JURY DEMAND

EuroImmun demands trial by jury on all claims and issues so triable.

Respectfully submitted,

PLAINTIFF, EUROIMMUN, A.G.

By: /s/Andrew M. Riddles

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Its Attorneys